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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

~~70 - 183~~

No. _____

THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its TRIBAL COUNCIL, and DORA JOYCE PRIETO, PRISCILLA GONZALES, GLORIA GILLETTEE, PATRICK PATENCIO and LAWRENCE PIERCE, Allottees, Individually and in Class Action, on behalf of ALL ALLOTTEES of Allotted land on the AGUA CALIENTE BAND OF MISSION INDIANS RESERVATION,

*Petitioners,*

vs.

THE COUNTY OF RIVERSIDE, a political subdivision of the STATE OF CALIFORNIA,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Constitutional Provisions, Statutes, Orders and Regulations Involved | 2 |
| Statement of the Case | 3 |
| Reasons for Granting the Writ | 6 |
| Conclusion | 12 |

Appendices:

| | |
|---|---|
| A. Executive Order of President William H. Taft, January 5, 1911 | 1a |
| B. Opinion of District Court | 2a |
| C. Opinion of Court of Appeals | 13a |
| D. Statutes and Regulations | 22a |

## CITATIONS

Cases: Page

*Agua Caliente Band of Mission Ind. v. County of Riverside*, 306 F. Supp. 279 (C. D. Cal. 1969) ..... 1

*Choate v. Trapp*, 224 U. S. 665, 32 S. Ct. 565, 56 L. Ed. 941 (1912) ..... 8

*Graciosa Oil Co. v. Santa Barbara County*, 155 Cal. 140, 99 P. 483 (1909) ..... 11

*Oklahoma Tax Comm'n v. Texas Co.*, 336 U. S. 342, 69 S. Ct. 561, 93 L. Ed. 2d 721 (1949) ..... 7

*Organized Village v. Egan*, 369 U. S. 60, 82 S. Ct. 562, 7 L. Ed. 2d 573 (1962) ..... 8

*Snohomish County v. Seattle Disposal Co.*, 70 Wash. 2d 668, 425 P.2d 22 (1967) *cert. denied*, 389 U. S. 1016 (1968) ..... 10

*Squire v. Capoeman*, 351 U. S. 1, 76 S. Ct. 611, 100 L. Ed. 883 (1956) ..... 10

*United States v. City of Detroit*, 355 U. S. 466, 78 S. Ct. 474, 2 L. Ed. 2d 424 (1958) ..... 6, 7, 8

*United States v. 43 Gallons of Whiskey*, 93 U. S. 188, 23 L. Ed. 846 (1876) ..... 8

*United States v. Holliday*, 70 U. S. (3 Wall) 407, 18 L. Ed. 182 (1866) ..... 8

*United States v. Rickert*, 188 U. S. 432, 23 S. Ct. 478, 47 L. Ed. 532 (1903) ..... 9

*Warren Trading Post Co. v. Arizona Tax Commission*, 380 U. S. 685, 85 S. Ct. 1242, 14 L. Ed. 2d 165 (1965) ..... 10

*Williams v. Lee*, 358 U. S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959) ..... 8

CITATIONS—Cont'd

*Constitutional Provisions, Statutes and Rules:*


| | Page |
|---|---|
| U. S. Const. art. I, § 8 | 8 |
| U. S. Const. art. VI, cl. 2 | 2 |
| Mission Indian Relief Act of 1891, 26 Stat. 712, § 3 | 2, 9 |
| 25 U.S.C. § 349 | 2 |
| 25 U.S.C. § 415 | 10 |
| 28 U.S.C. § 1254(1) | 2 |
| 28 U.S.C. § 1291 | 2 |
| 28 U.S.C. § 1331 | 2 |
| 28 U.S.C. § 1353 | 2 |
| 28 U.S.C. § 1362 | 2 |
| Exec. Order No. 3446 (April 30, 1921) | 9, 10 |
| Exec. Order No. 5580 (March 16, 1931) | 10 |
| Exec. Order No. 8580 (Oct. 29, 1940) | 10 |
| Exec. Order of President Taft (Jan. 5, 1911) | 3 |
| 25 C.F.R. § 1.4 (1969) | 11 |
| 25 C.F.R. pt. 131 | 11 |
| 25 C.F.R. Appendix | 9 |
| Cal. Rev. & T. Code Ann. §§ 107(b), 2914, 2917 and 2918 | 11 |

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

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No. _____

THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its TRIBAL COUNCIL, and DORA JOYCE PRIETO, PRISCILLA GONZALES, GLORIA GILLETTEE, PATRICK PATENCIO and LAWRENCE PIERCE, Allottees, Individually and in Class Action, on behalf of ALL ALLOTTEES of Allotted land on the AGUA CALIENTE BAND OF MISSION INDIANS RESERVATION,

*Petitioners,*

vs.

THE COUNTY OF RIVERSIDE, a political subdivision of the STATE OF CALIFORNIA,

*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Agua Caliente Band of Mission Indians, et al., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on May 12, 1971.

### Opinions Below

The opinion of the District Court (Appendix B to this petition) is reported at 306 F. Supp. 279 (C. D. Cal. 1969). The

opinion of the Court of Appeals (Appendix C to this petition) has not as yet been reported.

## Jurisdiction

This is an action brought by an Indian tribe and Indian allottees to determine whether certain leases on Indian lands are subject to California state taxation by a California county. The complaint was filed on January 19, 1966, and the amended complaint on September 27, 1966. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1353 and 1362 and 25 U.S.C. § 349. On October 17, 1969, the trial court held that the leasehold interests on Indian trust land were taxable. The matter was appealed to the United States Court of Appeals for the Ninth Circuit under 28 U.S.C. § 1291. On May 12, 1971, that court affirmed, District Judge Smith and Circuit Judge Wright making the majority, and Circuit Judge Ely dissenting. This Court has jurisdiction of this petition for certiorari under 28 U.S.C. § 1254(1).

## Question Presented

Can a California county, acting under state law, validly impose a possessory interest tax upon leases of Indian trust land on an Indian reservation?

## Constitutional Provisions, Statutes; Orders and Regulations Involved

The relevant constitutional provisions, statutes, orders and regulations are as follows:

1. U.S. Const. art. VI, cl. 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

2. Mission Indian Relief Act of 1891, 26 Stat. 712, § 3:

"SEC. 3. That the commissioners, upon the completion of

their duties, shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus patented, subject to the provisions of section four of this act, for the period of twenty-five years, in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or the remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever:"

3. Executive Order of President Taft allocating land to the Agua Caliente Tribe, Jan. 5, 1911. The Executive Order is attached as Appendix A to this petition.

4. The other statutes and regulations are too long for reproduction in this portion of the brief and are attached as Appendix D.

## Statement of the Case

The petitioners in this case are the Agua Caliente Band of Mission Indians, a group with a reservation established under the Mission Indian Relief Act of 1891 in and about Palm Springs, California, where they have been located since time immemorial. The Tribe and its members hold about 27,000 acres of land, of which 2,000 are Tribal land and 25,000 are individual allotments. Of this total amount, the Tribe has leased precisely 8 of its 2,000 acres and the individuals have leased about 1,250 of the remaining acres, so that something under 5 percent of the total reservation land is generating income.

Ironically, these Indians are thought to be wealthy. The fact is that they are "land rich and dollar poor" (T. 175), because they cannot freely sell their land. They are economically not capable of using it themselves except as they may lease it, and only a little is leased.

California has a possessory interest tax (see opinion of court below, Appendix C, n.2) which does not purport to tax the land of the Indians but it does tax the "full cash value" of the lessee's interest in it. On a long-term lease, this amounts economically to the same thing (T. 234). As a general matter, this tax runs to some 2-¼ percent of the appraised value of the land (T. 211).

In 1958, the Tribe gave a long-term lease to the operators of the Palm Springs Spa which was duly approved by the Secretary of the Interior. Indian leases had been made for many years, and without taxation. As the court below said, when these leases were executed no one supposed that the lessees would be required to pay any taxes by reason of their use of the Indian property. However in 1960 the state did assert a claim for the possessory interest tax.

This litigation followed. The fundamental question was the validity of the tax from various standpoints. A full trial was had, and evidence was taken. That evidence showed conclusively both to the trial court and to the Court of Appeals that the practical effect of the tax landed squarely on the Indians. As a result of it, the Tribe and the Indians got less rent and lost their bargaining position; as the court below said of the Indian, "the tax has an adverse economic effect upon him."

This is true although the tax is paid by the lessee, not by the Tribe or the allottee; Riverside County duly gets a check, and the signature is not an Indian's. But by the uncontradicted and complete evidence, the money comes from the Indians all the same. Moreover, the existence of the tax chills leasing and makes it difficult.

1. The hotel lease is the only lease the Tribe has. The priority of the tax put the hotel far in arrears to the Tribe on its rent.

2. An independent real estate developer testified that he had negotiated three leases on Tribal land, all on the assumption that they would be tax exempt. As a practical matter, the tax "made

it impossible for us" (T. 140) and all leases were forfeited. On other property, county taxes totaling $150,000 made it impossible for the lessee to pay the rent to the Indians (T. 89-93).

3. All these leases must be approved by the Bureau of Indian Affairs. Witnesses from the Bureau testified that the practical effect of the application of the tax is to push down the rent to the Indians by approximately 2 points, or from 20 to 25 percent of value. That is to say, leases are figured on a percentage basis at a 6 to 10 percent range depending on all the factors to be taken into account, and 2 of those points come off where there are taxes. This was confirmed by the testimony of the leading appraiser of Southern California who testified that as a practical matter the Indians "will then have to absorb the additional tax burden" (T. 219). The Bureau also confirmed that some lessees have not been able to keep their leases because of the taxes (T. 100-09).

4. The tax has diminished the leasing. Testimony from responsible witnesses was that unless lessees receive some advantage from dealing with the Indians, they would rather take their business elsewhere to avoid dealing with the Bureau of Indian Affairs. This is not an impled criticism of the Bureau. It is simply a fact of life that Indian arrangements are clumsier than private dealing. This is particularly true because the normal method of putting a major development onto leased lands is to make a lease, and then borrow mortgage money for construction. To do this, the land must be subordinated to the mortgage. But the Indian land can only be subordinated on the authority of orders from the farthest reaches of the Interior Department, which are rarely made (T. 205-06).

The net effect has been radically to reduce Indian leasing. As the area director for the Bureau of Indian Affairs said, "What happened was that benefits which we thought the Indians were entitled to were pretty well washed out." (T. 31). Some long-term leases have been executed since 1961 (T. 190), of which at least one expressly provides diminution of rentals by the amount of the

tax (T. 188-89). As has been noted, only 8 of the approximately 2,000 Tribal acres are leased, and Mr. Homer B. Jenkins, the assistant to the Area Director of the Bureau with direct responsibility for the Palm Springs area, testified that there was Indian property left to be developed "if we can get over this hurdle [the tax] for the Indian properties." (T. 188).*

The majority below, with what we read as evident reluctance, held that it must blindfold its eyes to the fact that this tax is for all economic purposes a tax on the Indians' land. It thought that the result was required by the decision of this Court in *United States v. City of Detroit*, 355 U. S. 466, 78 S. Ct. 474, 2 L. Ed 2d 424 (1958). That case upheld a Michigan possessory interest tax on land leased from the United States. Judge Ely, dissenting, saw the distinctions pressed by the Tribe between a tax the burden of which falls on the United States and a tax the burden of which falls on an Indian Tribe; and he also found the Indian trust lands to be in a different position than the federal lands.

## Reasons for Granting the Writ

1. We respectfully submit that this is probably the most important Indian case of recent years. The clear policy of the United States is to help Indians help themselves. About all that the Indians have is such land as they have been able to reserve. Except as they can lease it, they don't have much. As this record solidly shows, the California policy severely inhibits the merchandising of their one asset. This is far more than a matter of the revenue from the leased land for the lease commonly gives an opportunity for employment of Indians by the lessee. Both the revenue and the opportunity are cut off by this tax.

We shall leave it to the Tribes to speak for themselves, being aware that they may be expected to be heard from amicus. It can

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*The foregoing accurately states the record. In Palm Springs there is still only one Tribal lease. Since October, 1969 (the judgment date), there have been 17 individual leases, but at lower rental to compensate for the tax.

reasonably be expected that if this tax is upheld, it will be applied universally. To await further decisions on this subject is to court years of degradation and poverty.*

2. The decision below misapplies *United States v. City of Detroit, supra,* and *Oklahoma Tax Comm'n v. Texas Co.,* 336 U. S. 342, 69 S. Ct. 561, 93 L. Ed. 2d 721 (1949). In the *Detroit* case, the burden on the federal government was trifling. Here there is the utmost interference with the leasing function of the Tribe. We are dealing with more than "merely hypothetical interferences with governmental functions here asserted to sustain exemption," *Oklahoma Tax Comm'm v. Texas Co., supra.*

The court below applies the *Oklahoma Tax Comm'n* case to this situation. There the court upheld a per barrel tax on oil extraction by lessees of Indian lands. The oil extracted belonged entirely to the oil company and the tax is simply a kind of gross income tax on extractions, expressly noted by the Court to be minor in its consequence. In the instant case, we have nothing but a thinly disguised property tax, major in its consequences. Moreover, as the dissenting judge below stressed, that case expressly rested upon the fact that, "There is no possibility that

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*To counter the impression that somehow all this is to be borne because it is assumed that the Palm Springs Indians are exceptionally wealthy, we put into the record the experience of the Fort Mojave Indians, who are among the most poverty-stricken residents of North America. These residents live in a one-time Japanese relocation camp near Needles, California, in 20 by 28 foot hovels (T. 154-55), with as many as 16 occupants in a home, with no fire or police protection. This Tribe had been able to negotiate but one lease, and that lease was all that stood between them and the most appalling destitution. See Affidavit of Barrackman, and testimony of Barrackman at T. 146, *et seq.* From their lessee they received two payments of $50,000, which were the first substantial revenue the Tribe ever had from anybody in connection with its land (T. 159). The lessee then abandoned the lease (T. 160). Thereafter, a new lease was made, but at a revenue of $50,000 less for the first two years than would have been the case if the first lease had continued (T. 164). [Since the trial the Fort Mojaves have obtained one lease on their Arizona land, where there is no possessory interest tax, and none on their California land.]

ultimate liability for the taxes may fall upon the owner of the land." Here both courts below expressly accept the clear thrust of the evidence which is that the load falls squarely on the Indians.

3. *Detroit* is independently distinguishable. Only the federal government can regulate commerce with the Indian Tribes (U. S. Const. art. I, § 8); the power is "exclusive and unfettered," *United States v. 43 Gallons of Whiskey*, 93 U. S. 188, 23 L. Ed. 846 (1876), and this includes commerce with the individuals who compose the Tribe, *United States v. Holliday*, 70 U. S. (3 Wall.) 407, 417, 18 L. Ed. 182 (1866). As the record shows, this tax directly diminishes the most valuable commerce the Indians have with the white world.

Moreover, the Indians have their own sovereignty, and are distinct, independent political communities in which the laws of a state could have no force and effect, *Williams v. Lee*, 358 U. S. 217, 219, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959). State law may not be applied where it interferes with reservation self-government, *Organized Village v. Egan*, 369 U. S. 60, 67-68, 75, 82 S. Ct. 562, 7 L. Ed. 2d 573 (1962). Here the Tribe has its own taxes; economically the two systems cannot stand together.

Both the commerce and sovereignty factors distinguish *Detroit* from the instant case.

4. The decision below conflicts with the trust status of these lands and the decisions interpreting and applying that trust status. These lands are in tax-exempt trust. Such a trust could protect Indian lands from only one possible source of danger: taxing governments. This protection afforded Indian lands gives an economic advantage to the Indian. That advantage has been recognized as a vested property right. See *Choate v. Trapp*, 224 U. S. 665, 32 S. Ct. 565, 56 L. Ed. 941 (1912), expressly recognizing "vested rights of exemptions from state taxation" as a consequence of the trust. In *Choate v. Trapp*, the State argued that the tax exemption "was only intended to guard absolutely against alienation of the land, whether for taxes, or at judicial sale, or by private

contract. In other words, it is said that the tax exemption was only an additional prohibition against a sale, . . ." 224 U. S. at 672. The Court expressly held that the exemption and the non-alienability of the land were "two separate and distinct subjects." The exemption, it said, conferred a property right fully vested in the Indians. *Id.*

The County seeks to profit from a verbal distinction between a tax on the land and a tax on the use of the land, conceding the immunity of the one, and claiming the taxability of the other. This is plain word-chopping, but it should not be successful even at that for this is at root a tax upon trust interests, and the trust itself is a federal instrumentality which cannot be taxed. The best discussion is *United States v. Rickert,* 188 U. S. 432, 437-38, 23 S. Ct. 478, 47 L. Ed. 532 (1903), a passage too long to quote as extensively as it deserves, and we incorporate it by reference. That case also deals with trust lands and the taxability of personal property on them. The Court turns to the function of the trust and of the tax. As it says, "[t]o tax these lands is to tax an instrumentality employed by the United States. . . ." It says that if the tax is allowed, "then the obligations which the government has assumed in reference to these Indians may be entirely defeated." It stresses that at the end of the trust, just as here, the lands must pass to the Indians, "free of all charge or encumbrance whatsoever." As it holds, if taxes are outstanding, the lands are not "free from encumbrance."

The Mission Indian Relief Act of 1891, 26 Stat. 712, did expressly provide that these lands were to be held "in trust for the sole use and benefit" of the Indian.*

*The Executive Orders allocating the land to the Tribe, Ex. 13, were given under the Act of 1891 "in trust for the sole use and benefit of the said Agua Caliente Band," to be conveyed at the end of the trust period "free of all charge or encumbrance whatsoever." Order of President Taft, Jan. 5, 1911. (Appendix A). The chain of extensions of the trust is discussed by representatives of the Bureau of Indian Affairs in the record at T. 72; T. 182-83; and *see* 25 C.F.R. Appendix pp. 418-21. The testimony refers to certain executive orders. That of April 30, 1921, Exec. Order No.

As applied to the trust lands, the decision below is out of accord with *Squire v. Capoeman*, 351 U. S. 1, 76 S. Ct. 611, 100 L. Ed. 883 (1956). In this case the question was whether the Indian occupant of trust lands must pay a capital gains tax when he sold timber from his land. The government asserted that this was merely a tax on income and not a tax on the land held in trust for the taxpayer. The Court held that the imposition of the tax was incompatible with the provision of the trust that the land should be transferred "free of all charge or encumbrance whatsoever." The imposition of a capital gains tax was an encumbrance, for the trust was to be "free from all taxes" so long as it was in trust.* The Court held that "it is necessary to preserve the trust and income derived directly therefrom." This tax does not preserve the trust and it severely diminishes the income derived therefrom.

5. The tax interferes with existing federal regulations which have preempted the field. In *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U. S. 685, 85 S. Ct. 1242, 14 L. Ed. 2d 165 (1965), this Court held invalid the Arizona sales tax as applied to traders on the Navajo Indian Reservation. It concluded that, "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 380 U. S. at 690.

The same thing is true here.

The first Section of the General Leasing Act, 25 U.S.C. § 415,

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3446 extended the trust period for 10 years. Exec. Order No. 5580, March 16, 1931, extended it for an additional 10 years, and Exec. Order No. 8580, October 29, 1940, extended it for 25 years.

*In *Snohomish County v. Seattle Disposal Co.*, 70 Wash. 2d 668, 425 P.2d 22, 26 (1967), *cert. denied*, 389 U. S. 1016 (1968), the Supreme Court of Washington read this Court in *Squire v. Capoeman* as concluding "that the words 'charge or encumbrance,' as they appear in the General Allotment Act of 1887, should be interpreted broadly, and any doubt should be resolved in favor of the Indians. . . ." It adopted as the definition of "encumbrance" any "burden upon land depreciative of its value. . . ." Justices Douglas and White dissented from the denial of certiorari in *Snohomish*, believing that "A substantial federal question is presented."

permits leases upon this as well as certain other reservations for up to 99 years with the "approval of the Secretary of the Interior." It is expressly provided that "all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior." These regulations, 25 C.F.R. pt. 131, contain a comprehensive system of leases by which the leases are regulated to the decimal point. On this record the county's tax is a serious threat to the very existence of commercial leases carefully negotiated by the federal government for the benefit of its trust beneficiaries.

The leasing regulation must be read in conjunction with 25 C.F.R. § 1.4 (1969), the regulation of the Interior Department covering "state and local regulation of the use of Indian property." This section in express words precludes the operation of any state or local laws "controlling the use or development of any real or personal property" on the Indian trust lands. It is overwhelming on this record that this tax is regulating or, certainly, controlling the development of the Indian lands.

While, as the court below observed, the state does not claim the power to execute on the Indian lands if the taxes are not paid, it is clearly authorized by the statute to execute on the lease. It is expressly empowered to seize and sell possessory interests for unpaid taxes by sale at public auction with delivery of the property by payment, *Cal. Rev. & T. Code Ann.* §§ 107(b), 2914, 2917, 2918. This results in immediate possession, *Graciosa Oil Co. v. Santa Barbara County,* 155 Cal. 140, 99 P. 483 (1909).

The practical result would be possession and operation of property on Indian land in the teeth of careful Department regulations controlling admission to such activities, *see* 25 C.F.R., pt. 131.*

*On September 31, 1969, the County Tax Collector did seize a possessory interest of an Indian lessee from another Indian and the power to tax and collect on that parcel was upheld in a letter opinion of December 4, 1969, by the same county counsel who is our adversary in this case.

## Conclusion

We respectfully submit that the petition for the writ of certiorari should be granted.

Respectfully submitted,

LEWIS & ROCA

By John P. Frank

RAYMOND C. SIMPSON

Counsel for Petitioners

August, 1971

## Appendix A

Executive Order of President William H. Taft, January 5, 1911:

"The United States of America . . . does and will hold the said tracts of land selected as aforesaid — subject to all the restrictions and conditions contained in the said act of Congress of January 12, 1891 — for the period of twenty-five years in trust for the sole use and benefit of the said Agua Caliente Band or Village of Indians, according to the laws of California, and at the expiration of the said period the United States will convey the same or the remaining portion not patented to individuals, by patent to the said Agua Caliente Band or Village of Indians, as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever."

Appendix B

THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its Tribal Council, and DORA JOYCE PRIETO, PRISCILLA GONZALES, GLORIA GILLETTEE, PATRICK PATENCIO and LAWRENCE PIERCE, Allottees, Individually and in Class Action, on behalf of All Allottees of Allotted land on the Agua Caliente Band of Mission Indians Reservation,

*Plaintiffs,*

vs.

THE COUNTY OF RIVERSIDE, a political Subdivision of the State of California,

*Defendant.*

CIV. 66-108-R

United States District Court
C.D. California

October 17, 1969.

Action by American Indian tribe and allottees of allotted land on reservation against county to permanently enjoin assessment, levy and collection of possessory interest taxes and to recover damages. The District Court, Real, J., held that interest of non-Indian lessees in Indian lands was not immune under federal constitutional and statutory law from imposition of possessory interest taxes by county.

Judgment for defendant.

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Raymond C. Simpson, Long Beach, Cal., for plaintiffs.

Ray T. Sullivan, Jr., County Counsel, Richard J. Lawrence, Deputy County Counsel, Steven A. Broiles, Deputy County Counsel, Riverside, Cal., for defendant.

Fort Mojave Indian Tribe, Needles, Cal., amicus curiae.

REAL, Distict Judge.

Plaintiff THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its Tribal Council (hereinafter referred to as AGUA CALIENTE) and plaintiffs DORA JOYCE PRIETO, PRISCILLA GONZALES, GLORIA GILLETTE, PATRICK PATENCIO and LAWRENCE PIERCE on their own behalf and as representative of all allottees of allotted land on the Agua Caliente Indian Reservation (hereinafter referred to as ALLOTTEES) bring this action against defendant COUNTY OF RIVERSIDE (hereinafter referred to as COUNTY) to permanently enjoin the assessment, levy and collection of possessory interest taxes and to recover damages.

Plaintiff AGUA CALIENTE is an American Indian Tribe recognized by the United States of America in the Mission Indian Relief Act of 1891[1] with its amendments and Public Law 86-339.[2] By the Mission Relief Act, as amended, ALLOTTEES were individually allotted certain of the lands of the Agua Caliente Indian Reservation. All other lands of the reservation are unallotted tribal lands held for the benefit of the plaintiff AGUA CALIENTE.[3] Both allotted and unallotted tribal lands are held by the

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[1] 26 Stat. 712, January 12, 1891.

[2] P.L. 86-339, Sept. 21, 1959, 73 Stat. 602-605, 25 U.S.C. §§ 951-960.

[3] 25 U.S.C. § 953

"§ 953. Lands — Determination of value of unallotted and allotted lands; exclusion of deceased allottees' allotments

(a) * * *

Lands not subject to allotment; distribution of revenues from mineral springs parcel,

United States, in trust, for plaintiffs ALLOTTEES and AGUA CALIENTE.

Plaintiffs jointly, in the aggregate, own 26,646.28 acres of land laid out in a checkerboard pattern in the area of Palm Springs, California. Of this aggregate, 24,640.45 acres are allotted to 103 individual ALLOTTEES each having commercial, irrigable and desert lands appraised at $335,000.

Since the property is held in trust by the United States, the land cannot be sold or encumbered without the approval of the

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(b) In no event shall the following tribal lands be subject to allotment, and they shall henceforth be set apart and designated as tribal reserves for the benefit and use of the band:

Cemetery numbered 1, block 235, section 14, township 4 south, range 4 east.

Cemetery numbered 2, as now constituted pursuant to secretarial order, comprising approximately two acres.

Roman Catholic Church, as now constituted pursuant to secretarial order, comprising approximately two acres.

Mineral Springs, lots 3a, 4a, 13, and 14, section 14, township 4 south, range 4 east: *Provided,* That no distribution to member of the band of the net rents, profits, and other revenues derived from that portion of these lands which is designated as "parcel B" in the supplement dated September 8, 1958, to the lease by and between the Agua Caliente Band of Mission Indians and Palm Springs Spa dated January 21, 1958, or of the net income derived from the investment of such net rents, profits, and other revenues or from the sale of said lands or of assets purchased with the net rents, profits, and other revenues aforesaid or with the net income from the investment thereof shall be made except to those enrolled members who are entitled to an equalization allotment or to a cash payment in satisfaction thereof under section 951-958 of this title or, in the case of such a member who died after September 21, 1959, to those entitled to participate in his estate, and any such distribution shall be per capita to living enrolled members and per stirpes to participants in the estate of a deceased member.

San Andreas Canyon, west half southeast quarter, southeast quarter southeast quarter section 3, township 5 south, range 4 east.

Palm Canyon, south half and south half north half section 14, township 5 south, range 4 east; all section 24, township 5 south, range 4 east.

Tahquitz Canyon, southwest quarter section 22, township 4 south, range 4 east; north half section 28, township 4 south, range 4 east.

Murray Canyon, east half section 10, township 5 south, range 4 east.

(c) * * *

(d) * * *"

Bureau of Indian Affairs. Leases have been approved and cover 8 acres of allotted land. 59 Indians participate in long-term leases and 116 Indians participate in short-term leases. These leases generate practically all of the income available to plaintiffs' ALLOTTEES and AGUA CALIENTE.

Negotiations for the lease which precipitates this action began in 1957 and in 1958 a lease was executed for the land upon which is situated a major hotel, Palm Springs Spa. This lease is the sole lease upon tribal lands covering 8 acres. Negotiations for the lease were predicated upon an 8% return on capital to plaintiff. Both parties executed the lease under the impression that the land was tax exempt and that the property would be tax exempt as to the lessee.

Commencing with the tax year 1960-61, defendant COUNTY began assessing and collecting possessory interest taxes which have been steadily increasing since then.

Plaintiffs claim herein that imposition of a possessory interest taxes upon the interest of non-Indian lessees in Indian lands is unlawful because of:

1. Article I, Section 8, Clause 3 of the Constitution of the United States of America;
2. Section 1 of the Fourteenth Amendment to the Constitution of the United States of America;
3. P.L. 83-280, Aug. 15, 1953, 67 Stat. 589, 28 U.S.C. section 1360 and amendments thereto.

Defendant COUNTY supports its power to impose possessory interest taxes claiming authorization in 25 U.S.C. section 398c or 28 U.S.C. section 1360.

## THE TAX INVOLVED AND ITS IMPACT

California Revenue and Taxation Code Section 107 provides in pertinent part:

"§ 107 Possessory interests; * * *

'Possessory interests' means the following:

(a) Possession of, claim to, or right to the possession of

land or improvements, except where coupled with ownership of the land or improvements in the same person.

(b) Taxable improvements on tax-exempt land.

* * *"

The simple statement of the statutory provision for taxation of possessory interest describes two classes of property rights — (1) the aggregate of rights, duties, privileges and immunities accruing to an individual (or other legal entity) out of *possession* of an underlying fee interest in land or (2) improvements on an otherwise tax-exempt fee interest. We are not here concerned with the legal or beneficial ownership of the underlying fee interest in land. It is the possession of tax-exempt Indian lands owned by non-Indians. In other words, it is the property interest owned by the non-Indian that is the subject of this litigation and it is that property interest that defendant attempts to reach by its assessment, levy and collection of a possessory interest tax.

California Revenue and Taxation Code Section 107 provides only for the assessment, levy and collection of a tax from the owner of a possessory interest defined therein. Its impact—at least directly—in terms of the various interests considered here is upon the non-Indian lessee of tax-exempt Indian lands.

[1] Plaintiffs claim—through testimony of experts—that the defendant's tax must be paid by the Indian owners directly by rent adjustments or at least indirectly in considering negotiations for future leases by adjustment of their return upon valuation of their tax-exempt land. Assuming that the economic burden of this possessory interest tax falls eventually upon plaintiffs, it is not —for that reason—invalid. *United States v. City of Detroit,* 355 U.S. 466, 78 S.Ct. 474, 2 L.Ed.2d 424; *Alabama v. King & Boozer,* 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3; *Graves v. New York,* 306 U.S. 466, 59 S.Ct. 595, 83 L.Ed. 927; *James v. Dravo Contracting Co.,* 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155.

## CLAIMS OF IMMUNITY

### IMMUNITY UNDER THE COMMERCE CLAUSE

Article I, Section 8, Clause 3 of the Constitution of the United States provides in its pertinent part:

"Section 8. The Congress shall have Power * * *;

* * * * * *

To regulate Commerce * * * with the Indian Tribes;"

[2] The nature of Congressional power in Indian matters is paramount and plenary. *Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251; *United States v. Kagama,* 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228; *Worcester v. Georgia,* 6 Pet. 515, 8 L.Ed. 483. But statement of the power does not end the inquiry. It must be ascertained that the activity or subject matter of the inquiry is "commerce."

Defendant herein asserts its taxing power against the property right of a non-Indian. It does not claim nor assert any right to tax the underlying fee interest of the Indian. "Commerce" is a broad term given broad meanings by the Supreme Court. *United States v. South Eastern Underwriter's Ass'n,* 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440; *Carter v. Carter Coal Co.,* 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160. No decision has given to a property right created out of contractual relations the status of commerce.

[3, 4] Plaintiffs claim that Congress has pre-empted Indian affairs by its comprehensive provisions of Title 25 United States Code and its regulations comprising a full volume of 25 Code of Federal Regulations. Pre-emption can be no broader than the power — the power to regulate commerce. The subject matter of the tax herein is the property right of a non-Indian which — though it may have resulted from Indian commerce — is neither "commerce" nor a contemplation of commerce. The relationship is one of lessor-lessee providing for no more "trade" than the payment of rent for use of Indian lands.

IMMUNITY PURSUANT TO P.L. 83-280, AUG. 15, 1953, 67 STAT. 589, 28 U.S.C. SECTION 1360 AND AMENDMENTS THERETO

[5] Plaintiffs claim that defendant is precluded from taxing the possessory interest of non-Indian lessees on tax-exempt Indian lands because of 28 U.S.C. § 1360 [P.L. 83-280, Aug. 15, 1953, 67 Stat. 589].

Title 28 U.S.C. § 1360 provides in its pertinent part:

"(a) * * *

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property * * * belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; * * *."

This statute concedes tax immunity to real or personal property *belonging to an Indian* imposing the further condition that the property be held in trust by the United States or subject to some Federal restraint on alienation. The property right attempted to be taxed herein does not belong to an Indian but to a non-Indian.

Defendants conversely ground their jurisdictions over this property right in this very same section. Subsection (a) of § 1360 provides in pertinent part:

"(a) * * * those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory."

California Revenue and Taxation Code Section 107 is a civil law of general application to private persons and private property and pursuant to 28 U.S.C. § 1360(a) has the same force and effect upon non-Indians within the Indian country as it has elsewhere within the State of California.

## IMMUNITY BY REASON OF THE TRUST STATUS OF INDIAN LANDS

[6] The plight of the Indian in American History needs no articulation here. If despair has any meaning, its application to Indians in the late 19th century is an understatement. Somewhat out of a sense of guilt—but more hopefully out of a sense of justice—the Congress passed the Mission Indian Relief Act of January 12, 1891 (26 Stat. 712) providing that the United States was to hold "in trust for the sole use and benefit" of the Indians certain lands, the subject of this action.

Plaintiffs maintain that the trust created by the Mission Indian Relief Act must reserve to the Indians an economic advantage which is being destroyed by the imposition of a possessory interest tax upon the non-Indian lessees. That argument can be sustained only with the sense of guilt approach. The history of this Republic chronicles a plethora of instances—both Indian and non-Indian—of the loss of vast land-holdings through the vicissitudes of mortgage foreclosures and tax-sales. The purpose of the trust created is to assure the beneficiary of an estate "free of all charge or incumbrance whatsoever."

[7] Plaintiffs make much of the value of the immunity of their trust lands from taxation. They discuss it in terms of a vested property right—and it is so held in *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941. But property only has "value"—in the sense propounded by plaintiffs' experts—if it can be sold or otherwise alienated for a valuable consideration. But here plaintiffs cannot—by conveyance of the fee upon termination of the trust status—transfer any tax immunity or tax exemption. The economic advantage or value of the tax immunity is one that can be exploited solely by the Indian and then only during the trust period.

[8] The economic effect upon the so-called economic advantage created by the trust is greatly exaggerated because the tax complained of by these plaintiffs is substantial. The amount of

the tax does not determine its validity. Here the tax is substantial because the property interest taxed is substantial. A possessory interest in a leasehold of 99 years is tantamount to an estate in fee for assessment purposes. *De Luz Homes, Inc. v. County of San Diego*, 45 Cal.2d 546, 290 P.2d 544; *County of Riverside v. Palm-Ramon Development Co.*, 63 Cal.2d 534, 47 Cal.Rptr. 377, 407 P.2d 289.

A finding of validity of a possessory interest tax in this situation is compelled by *United States v. Detroit* (supra), where the Supreme Court held a possessory interest tax valid where imposed upon the use of tax-exempt real property leased from the United States by a private person. Plaintiffs would have the Court read the *Detroit case* (supra) only to give standing to plaintiffs to prosecute this action. Although sufficient authority for that contention, it would disregard the clear import of the case to deny its application to the tax here because Indians are involved. A trustor can grant no greater property than he owns. If the Government could not prevail in the *Detroit* case (supra) its wards and beneficiaries cannot prevail here.

*Detroit* (supra) gives a simple answer to all of plaintiffs arguments when the Court says at page 472 of 355 U.S. at pages 477-478 of 78 S.Ct.:

> "* * * [H]ere we have a tax which is imposed on a party using tax-exempt property for its own 'beneficial personal use' and 'advantage'.
>
> It is undoubtedly true, as the government points out that it will not be able to secure as high rentals if lessees are taxed for using its propetty. But * * *, the imposition of an increased financial burden on the Government does not, by itself, vitiate a state tax."

That Congress could have extended the tax immunity to plaintiffs' lessees is no answer. Without deciding whether it could or not the simple fact is it did not.

See also: *Oklahoma Tax Commission v. Texas Co.*, 336 U.S.

342, 69 S.Ct. 561, 93 L.Ed. 721; *Thomas v. Gay*, 169 U.S. 264, 18 S.Ct. 340, 42 L.Ed. 740.

## IMMUNITY BECAUSE OF SOVEREIGNTY OF INDIAN TRIBES

[9] Plaintiffs claim that as a sovereign they have imposed a tax and defendant's tax is therefore double taxation. This tribal tax was first imposed in September 1967. Without deciding the validity of the tribal tax, it appears that its enactment was more in aid of litigation than any serious attempt to raise revenue for tribal operations.

In any event the question of sovereignty is well answered in *Acosta v. San Diego County*, 126 Cal.App.2d 455, 272 P.2d 92 and needs no further articulation here.

## JURISDICTION

[10] The jurisdiction of this Court to hear this matter is found in Title 28 U.S.C. section 1362. Plaintiffs have standing to bring this action to determine application of the provisions of California Revenue and Taxation Code Section 107 to property claimed immune under Federal Constitutional and statutory law. Cf. *United States v. City of Detroit* (supra).

Plaintiffs press on the Court *Squire v. Capoeman*, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883; *Snohomish County v. Seattle Disposal Company*, 70 Wash.2d 668, 425 P.2d 22; *Your Food Stores Inc. v. Village of Espanola*, 68 N.M. 327, 361 P.2d 950; and *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165; as dispositive of the issues presented herein. Reading those cases makes them each distinguishable. *Squire* (supra) involves proceeds of Indian property in the hands of an Indian— *Warren Trading Post Company* (supra) and *Your Food Stores Inc.* (supra) concern what is unmistakenably Indian commerce in its classic sense and *Snohomish County* (supra) is a consideration of encumbrances upon the *use* of Indian land.

This memorandum opinion shall serve as findings of fact and conclusions of law pursuant to Federal Rules of Civil Procedure Rule 52(a).

Judgment shall accordingly be for defendant and the Clerk is instructed to so enter it.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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| THE AGUA CALIENTE BAND OF MISSION INDIANS, by and through its Tribal Council, and DORA JOYCE PRIETO, PRISCILLA GONZALES, GLORIA GILLETTEE, PATRICK PATENCIO and LAWRENCE PIERCE, Allottees, Individually and in Class Action, on behalf of All Allottees of Allotted land on the Agua Caliente Band of Mission Indians Reservation,<br>*Appellants,*<br>vs.<br>THE COUNTY OF RIVERSIDE, a political Subdivision of the State of California,<br>*Appellee.* | No. 25,298 |

[May 12, 1971]

Appeal from the United States District Court
for the Central District of California

Before: ELY and WRIGHT, Circuit Judges, and SMITH,* District Judge.

The Agua Caliente Band of Mission Indians (hereafter The Band),[1] together with individual members of the Band (here-

*The Honorable Russell E. Smith, Chief Judge of the United States District Court for the District of Montana, sitting by designation.

[1]See 26 Stat. 712, January 12, 1891, 73 Stat. 602, 25 U.S.C. Sections 951-960 (1959).

after the Allottees) appeal from a judgment of the District Court refusing to enjoin the imposition of the California Possessory Interest Tax[2] on the lessees of the Indian land.

The Secretary of the Interior, acting under Congressional authority,[3] allotted to the individual members of The Band and to The Band itself a total of 26,646.28 acres in the area of Palm Springs, California. These lands are interspersed among non-Indian lands in a checkerboard pattern. The legal title to them is in the United States in trust. Of these lands 1250 acres, including eight acres owned by The Band, are under long term leases, made as authorized by 25 U.S.C. Section 415 by the Allottees and The Band with the approval of the Secretary of the Interior. At the time the leases were executed all parties contemplated that the lessees would not be required to pay any taxes by reason of their use and possession of the Indian property.

Jurisdiction as to the claims of the Allottees is found in 28 U.S.C. Section 1331; and as to The Band in 28 U.S.C. Section 1331 and

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[2]" 'Possessory interest' means the following:

(a) Possession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person.

(b) Taxable improvements on tax-exempt land. Except as provided in this section, possessory interests shall not be considered as sufficient security for the payment of any taxes. Leasehold estates for the production of gas, petroleum and other hydrocarbon substances from beneath the surface of the earth, and other rights relating to such substances which constitute incorporeal hereditaments or profits a prendre, are sufficient security for the payment of taxes levied thereon. Such estates and rights shall not be classified as possessory interests, but shall be placed on the secured roll.

In the event of delinquency in the payment of any installment of taxes on such leasehold estates or rights, they shall be subject to seizure and sale in the same manner as provided for the seizure and sale of possessory interests in Sections 2914 and 2919, inclusive, at any time within three years after the delinquency. Suit may be brought against an assessee of such taxes in the event of delinquency in the payment thereof." California Revenue and Taxation Code, Section 107.

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[3]See footnote 1, *supra*.

Section 1362, unless, as defendants claim, the court is deprived of jurisdiction by 28 U.S.C., Section 1341, which reads: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

This section has been held to be inapplicable to cases involving taxation of instrumentalities of the United States, at least in cases where the United States is a party.[4] Indian property uniformly is said to be an instrumentality of the United States.

> "Perhaps the most frequent reason stressed by the courts for the exemption of Indian property from State taxation is the Federal Instrumentality doctrine. The doctrine in its application to Indians and Indian property is founded upon the premise that the power and duty of governing and protecting tribal Indians is primarily a Federal function, and that a State cannot impose a tax which will substantially impede or burden the functioning of the Federal Government." Federal Indian Law, Dept. of Int., 1958, page 846.[5]

At the instance of the United States, as trustee, State laws taxing Indian property may be contested in the Federal District Court. An Indian, as the beneficial owner of lands held by the United States in trust has a right acting independently of the United States to sue to protect his property interests.[6] The reasons given in *United States v. Livingston, supra,* for exempting instrumentalities

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[4] *Department of Employment, et al. v. United States, et al.*, 385 U.S. 355 (1966), *United States v. Livingston*, 179 F.Supp. 9 (E.D.S.C. 1959), affirmed without opinion 364 U.S. 281 (1960). It is to be noted that in one of these cases a public corporation was a co-plaintiff with the United States, and that in the other a private corporation was a co-plaintiff with the United States.

[5] Cited in support: *United States v. Rickert*, 188 U.S. 432 (1903); *United States v. Pearson*, 231 Fed. 270 (1916); *Dewey County, S.D. v. United States*, 26 F.2d 434 (1928), *cert. den.* 278 U.S. 649 (1928); *United States v. Thurston County*, 143 Fed. 287 (1906); *United States v. Wright*, 53 F.2d 300 (1931), *cert. den.* 285 U.S. 530; *Morrow v. United States*, 243 Fed. 854 (1917).

[6] *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968).

of the United States from the operation of 28 U.S.C. Section 1341 are no less cogent when the right to the exemption is asserted by one who properly could be a co-plaintiff with the United States. We conclude that the District Court did have jurisdiction.

The California tax on possessory interests does not purport to tax the land as such, but rather taxes the "full cash value" of the lessee's interest in it.[7] Upon default in payment of the tax the Indian lessor is not liable for payment of it and the Indian's title to the land is not encumbered.[8]

A substantial amount of evidence was received bearing upon the economic effects of the tax upon the Indian. We conclude from it what we would conclude without it, that it, [sic] a lessee can afford to pay more rent if he is not required to pay a possessory interest tax. If an Indian's land is not subject to that tax he enjoys a better bargaining position than he otherwise would, and hence that the tax has an adverse economic effect upon him.

States may not without the consent of Congress tax the property of the United States,[9] nor may they tax instrumentalities of the United States.[10]

If the Indian as a beneficial owner of the land, the legal title to which is in the United States, is entitled to no more protection than the United States itself would enjoy, absent a congressional action forbidding the tax, then it is clear that the tax here imposed is valid. In *United States v. City of Detroit, supra,* (fn. 9) it was held that a tax similar to the California Possessory Interest tax could be levied upon a lessee holding land under a lease from the federal government even though the burden of the tax fell directly

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[7]*County of Riverside v. Palm Ramon Development Co.*, 63 Cal. 2d 534, 47 Cal. Rptr. 377, 407 P.2d 289 (1965).

[8]Cal. Rev. and Taxation Code, Sections 2914-2919, 3003, 3101-3107.

[9]*United States v. City of Detroit*, 355 U.S. 466 (1958).

[10]See cases cited in footnotes 4 and 5.

upon the United States. If it was not clear before, it is clear since *United States v. City of Detroit, supra,* that "the imposition of an increased financial burden on the Government does not, by itself, vitiate a state tax" and that the tax imposed upon the use of property is something distinct from a tax imposed upon the property itself. We conclude from this that the tax here is properly imposed unless it can be said that the legislation dealing with Indians and Indian lands demonstrates a congressional purpose to forbid the imposition of it.

Here, as in *United States v. City of Detroit, supra,* there is no statute which expressly forbids the imposition of a state use tax. The statutory law mentioning the taxation of these lands is found in an equalization act[11] and in a statute granting some measure of regulatory power to local governments.[12] If, as was said in *United States v. City of Detroit, supra,* a tax upon the use of property is

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[11]Public Law 86-339, Sept. 21, 1959, 73 Stat. 602, Sec. 5

"(a) The right to an equalization allotment or to a cash payment in lieu thereof pursuant to section 3, subsection (d), of this Act, shall be transferable by will or descent in the same manner as are trust payments under existing law and shall not be subject to State or Federal inheritance, estate, legacy, or succession taxes.

(b) A cash payment made in lieu of an equalization allotment pursuant to section 3, subsection (d) of this Act shall not be regarded as income or capital gain for purposes of Federal or State income taxation and shall not, as long as it remains in the form of cash or a bank deposit in the ownership of the allottee, be subject to taxation as personal property."

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[12]U.S.C. Section 1360. "(b) Nothing in this section (the one granting the regulatory power) shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

not a tax upon the property itself, then there is nothing in these statutes which expressly forbids the tax here imposed.

It remains however to determine whether from other legislation dealing with Indians and Indian land a purpose to exempt these allotments from the kind of a tax herein imposed may be found. The law initially authorizing the allotments[13] provides that the land shall be held in trust for the "sole use and benefit" of The Band or Allottees and that at the expiration of the trust period the land shall be transferred "free of all charge and encumbrance whatsoever." This language is identical with the language used in the general allotment Act[14] and in *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342 (1949) the Supreme Court refused to imply a tax exemption on the basis of that language. The general rule that tax exemptions are not granted by implication is applicable to taxing acts affecting Indians as it is to all others.[15]

The position urged by the Indians here was fully supported by *Gillespie v. Oklahoma*, 257 U.S. 501 (1922) wherein Mr. Justice Holmes said "A tax on the leases was a tax upon the power to make them and could be used to destroy the power to make them" and "the same considerations that invalidate a tax upon the leases invalidate a tax upon the profit of the leases, and stopping short of theoretical possibilities, a tax upon such profits is a direct hamper upon the effort of the United States to make the best terms that it can for its wards." That position however was specifically rejected in *Oklahoma v. Texas Company, supra*, and it is now untenable.

Appellants and *amicus curiae* press upon us the economic plight

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[13] 26 Stat. 712 (1891).

[14] 25 U.S.C. Section 348.

[15] *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). *Squire v. Capoeman*, 351 U.S. 1 (1956) may point to, although it does not express, a different rule where the taxing power of the United States comes in conflict with the interest of the ward.

of the Indians and persuasively attack the concept that a tax upon the use of a thing is not a tax upon the thing itself, but as we see it these arguments are foreclosed by the decisions cited.[16]

The judgment appealed from is affirmed.

ELY, Circuit Judge (Dissenting):

I respectfully dissent. The obligation of the federal government to its Indian wards, probably born of a collective national guilt, runs deep. It is federal policy, undeniable, if belated, that the Indian has a special status in our Country and that he is justly entitled to very special protection. I cannot join in stripping such a protection from the Agua Caliente Band in the face of the overwhelming evidence that the tax in question amounts, in its effect, to taxation of the full value of Indian trust lands.

It is conceded by all concerned that were Riverside County's possessory interest tax imposed directly on the Indian lands, it would be unlawful. My Brothers, however, feel constrained by *United States v. Detroit*, 355 U.S. 466, 2 L. Ed. 2d 424, 78 S. Ct. 474 (1958), to hold that "the tax imposed upon the use of property is something distinct from a tax imposed upon the property itself." They conclude the tax to have been validly imposed absent legislative immunization. They further rely upon *Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 93 L. Ed. 721, 69 S. Ct. 561 (1949), to conclude that no such legislative immunization may be implied. I strongly disagree with both conclusions.

*Detroit* simply expressed the view, with which I have no disagreement, that the doctrine of intergovernmental immunity does not preclude state taxation of an entity *solely* because the burden of such taxation eventually falls on the federal government. If, however, an important federal policy conflicts with the goal of

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[16]California has made no attempt to seize and sell the interest of the lessees in any of the property involved in this action, and it is unnecessary here to touch upon the problem which would be created were the State of California, by some process of seizure and sale, to endeavor to substitute in an Indian lease a new lessee in the absence of the consent of the Indians and of the Secretary.

effective implementation of the state taxing power, I should think that the Supremacy Clause demands that the extent to which a state tax burdens the federal policy be an important factor in determining the validity of the tax. There was no such conflict in *Detroit*. Here, I submit, the conflict is unmistakable, and the burden onerous.

Moreover, even if the majority has correctly interpreted *Detroit*, the local tax here involved was illegal. The Agua Caliente lands were given "for the sole use and benefit" of the Band, to be conveyed at the end of the trust period "free of all charge or encumbrance whatsoever." The land involved in *Oklahoma Tax Comm'n* was allotted pursuant to a statute containing the same language, and my Brothers construe the opinion in that case as a refusal to imply a tax exemption from the language. But this, I submit, is an incorrect reading of that case. The court in *Oklahoma Tax Comm'n* was addressing itself primarily to the constitutional status of lessees of government-owned lands, whether Indian trust or otherwise. The lessees in that case sought exemption as federal instrumentalities. "The respondents are 'private persons' who seek immunity 'for their property or gains because they are engaged in operations under a government contract or lease.'" 336 U.S. at 363. Since the Indian lessors bore no tax burden, direct or indirect, the lessees were precluded from urging a derivative immunity from the Indian grant. "These cases present no question concerning the immunity of the Indian-lands themselves from state taxation. *There is no possibility that ultimate liability for the taxes may fall upon the owner of the land.*" 336 U.S. at 353 (emphasis supplied). The statutory implication which was rejected in that case was not urged from the Indian grant, but from the fact of the lease itself. No derivative Indian rights were asserted by the non-Indian lessees, and no Indian was a party to the action. Indeed, the crucial language of the statute was not discussed, or even mentioned!

Underscoring the limited relevance of *Oklahoma Tax Comm'n*

is *Squire v. Capoeman*, 351 U.S. 1, 100 L. Ed. 883, 76 S.Ct. 611 (1956). There, the Supreme Court, fulfilling a "clear 'duty to secure to the Indians all that by any fair construction of treaty or statute can be held to have been understood by them or intended by Congress[,] Minnesota v. Hitchcock, 185 U.S. 373, 402 (1902),'" actually did construe the "charge or encumbrance" language alleged to have been at issue in *Oklahoma Tax Comm'n.* Without reference to the *Oklahoma* case, the language was construed to include taxation.

The majority's footnote 15 gives inadequate expression to the force of *Squire*. The case did not turn on the difference between state and federal taxation of Indian trust lands. Rather, the case stands for the proposition that the federal policy of protecting Indian wards is superior even to the need to collect revenue for the maintenance of the federal government itself. Surely, we should afford no less protection when the interest of the Indian ward is in conflict with an interest of a state. Some of the States were likely no less responsible than the Nation for alleged depredations of Indian property sometimes said to have caused the creation of federal trust status in the first instance. *Cf.* Note, 42 S.Cal. L. Rev. 101, 110 n.42 (1969).

I would reverse.

# Appendix D

## Statutes and Regulations

1. 28 U.S.C. § 1360(b):

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein."

2. 25 U.S.C. § 415(a):

"§ 415. Leases of restricted lands for public, religious, educational, recreational, residential, business, and other purposes; approval by Secretary

"(a) Any restricted lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land on the Agua Caliente (Palm Springs) Reservation, the Dania, Reservation, the Swinomish Indian Reservation, the Southern Ute Reservation, the Fort Mojave Reservation, the pueblo of Cochiti, the pueblo of Pojoaque, the pueblo of Tesuque,

the pueblo of Zuni, the Hualapai Reservation, the Spokane Reservation, the San Carlos Apache Reservation; Yavapai-Prescott Community Reservation, the Pyramid Lake Reservation, the Gila River Reservation, the Tulalip Indian Reservation, and the Navajo Reservation which may be for a term of not to exceed ninety-nine years, and except leases of land for grazing purposes which may be for a term of not to exceed ten years. . . ."

3. 25 C.F.R. § 1.4(a):

"§ 1.4 State and local regulation of the use of Indian property.

"(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States."

4. Partial Table of Contents, 25 C.F.R., pt. 131:

[This regulation is too long to reproduce; for reference to particular sections, a portion of its Table of Contents follows:]

"PART 131 — LEASING AND PERMITTING

Sec.

131.1 Definitions.
131.2 Grants of leases by Secretary.
131.3 Grants of leases by owners or their representatives.
131.4 Use of land of minors.
131.5 Special requirements and provisions.
131.6 Negotiation of leases.
131.7 Advertisement.

131.8 Duration of leases.
131.9 Ownership of improvements.
131.10 Unitization for leasing.
131.11 Conservation and land use requirement.
131.12 Subleases and assignments.
131.13 Payment of fees and drainage and irrigation charges.
131.14 Violation of lease."